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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD CAMARENA,

Defendant and Appellant.

G049416

(Super. Ct. No. 12CF2271)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed and remanded with directions.

David L. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Camarena appeals from a judgment after a jury convicted him of attempted murder, aggravated mayhem, and assault with a deadly weapon and found true various enhancements, including gang enhancements. Camarena argues insufficient evidence supports his conviction for aggravated mayhem, the trial court's instructions on imperfect self-defense were incomplete, and the court erred by failing to strike the gang enhancement on his attempted murder conviction.

In our prior nonpublished opinion *People v. Camarena* (Oct. 9, 2015, G049416) (*Camarena I*), we affirmed Camarena's convictions. In doing so, we concluded sufficient evidence supported his aggravated mayhem conviction, the trial court properly instructed the jury, and he did not receive ineffective assistance of counsel. Additionally, relying on *People v. Campos* (2011) 196 Cal.App.4th 438 (*Campos*), we rejected his claim Penal Code section 186.22, subdivision (b)(5),<sup>1</sup> was an alternate penalty provision and not a sentence enhancement the trial court had discretion to strike, acknowledging the issue was then before the California Supreme Court.

The California Supreme Court granted review on January 20, 2016, S230235. On October 12, 2016, the Supreme Court transferred the matter to this court, with directions to vacate our decision and reconsider it in light of *People v. Fuentes* (2016) 1 Cal.5th 218 (*Fuentes*). Pursuant to California Rules of Court, rule 8.200(b), the Attorney General filed a supplemental letter brief on the effect of *Fuentes, supra*, 1 Cal.5th 218, conceding the matter must be remanded. Camarena did not file a supplemental letter brief.

As we explain below, sufficient evidence supported Camarena's aggravated mayhem conviction, the trial court properly instructed the jury, and he did not receive ineffective assistance of counsel. However, based on *Fuentes, supra*, 1 Cal.5th 218, we conclude the matter must be remanded to allow the trial court to exercise its discretion

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<sup>1</sup> All further statutory references are to the Penal Code.

regarding the section 186.22, subdivision (b)(5), enhancement and, if so, for resentencing.

### FACTS

One July afternoon, 22-year-old Darnell Dearing, who is African American, walked alone on 17th Street between Lincoln and Grand. He was unarmed. A burgundy sports utility vehicle (SUV) passed him before he crossed 17th Street to enter the strip mall parking lot. The male passenger, Camarena, made hand gestures, either “P” or “D”. As Dearing crossed the street, the SUV made a U-turn. While he walked through the parking lot, the SUV pulled in front of him. From the SUV’s passenger side, Camarena asked Dearing where he was from. Dearing answered, “I don’t bang,” meaning he did not belong to a gang. Camarena said, “I’m from Darkside,” and Dearing said “I don’t give a fuck.” Camarena got out of the SUV, and he hit Dearing in the face two times with his right fist. Dearing hit Camarena twice. Dearing then felt a blow to his neck.

Officer Carlo Marzocca responded to the scene, saw the men fighting, and ordered them to stop over his public address system. When Dearing dropped his hands and turned to look at Marzocca, Camarena raised his right hand, which held something, and made “a slashing motion from upper right to lower left.” Dearing grabbed the left side of his neck or throat. Camarena walked toward the SUV and tossed a long, thin object into the right front passenger side. Marzocca drew his gun, ordered Camarena to the ground, and handcuffed him. Camarena had blood on his shirt, but he suffered no injuries to his face or hands. Marzocca directed the female driver to park the SUV. Marzocca recovered a seven-inch black handled kitchen knife from the SUV’s glove compartment.

At the hospital, Dearing was treated for the injury to his neck and given morphine for the pain. His lip and shoulder were cut, and he suffered an injury to his eye and temple.

An information charged Camarena with the following: attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a)) (count 1); aggravated mayhem (§ 205) (count 2); and assault with a deadly weapon (§ 245, subd. (a)(1)) (count 3). The information alleged Camarena committed counts 1, 2, and 3 for the benefit of a criminal street gang (§ 186.22, subd. (b)), and he inflicted great bodily injury (§ 12022.7, subd. (a)). The information also alleged he personally used a deadly weapon (§ 12022, subd. (b)(1)), to commit counts 1 and 2.

At trial, the prosecutor offered the testimony of gang expert Officer George Kaiser. After detailing his background, training, and experience, Kaiser testified concerning the culture and habits of traditional, turf-oriented Hispanic street gangs. Kaiser testified concerning the following: how to join a gang; levels of gang membership; the concept of respect and how to earn respect by committing violent acts for the gang; “hit[ting] up” another person to learn their gang affiliation; what it means to claim a gang, including using gang hand signs; and the importance of weapons within gang culture.

Kaiser testified Darkside formed in the 1990’s and it was a turf-oriented Hispanic gang with between 30 and 100 active members. He stated its common symbol was “DS,” “DSK,” or “DSX3,” and its gang sign is to make a “d” with one hand. He said Darkside’s primary activities were assaults, assaults with deadly weapons, car thefts, and illegal possession of guns. He also testified concerning the statutorily required predicate offenses. Kaiser opined Darkside was a criminal street gang.

Kaiser testified Camarena had approximately 15 police contacts between 2006 and 2012, and in 2007 admitted being affiliated with Darkside. He said that in 2007, Camarena was caught tagging letters of the Darkside gang and was constantly talking about Darkside in school. Kaiser added the incident here was not in Darkside’s claimed territory. Based on hypothetical questions matching the facts of this case, Kaiser opined the offenses benefitted and promoted Darkside because they instilled fear in the

victim and increased Darkside's reputation in the community when the perpetrator flashed the Darkside gang sign and used a knife to commit a violent act.

Camarena offered the following testimony. Nohemi Camarena, Camarena's mother, testified he was 10 or 11 years old when his older brother Miguel Camarena (Miguel) left their house. Miguel had been in trouble for his involvement in Darkside. To her knowledge, Camarena was not involved in Darkside. Camarena had been in special education classes since the first grade, and he had trouble reading.

Jose Guzman, Camarena's friend, testified he was in the SUV that afternoon. Guzman stated an angry dark-skinned male approached the passenger side of the SUV and yelled at them to fight. When Camarena got out of the SUV, the man punched Camarena. Camarena fought back but he did not have a weapon.

Eric Aguilar also testified he was in the SUV. Aguilar stated Camarena got out of the SUV and he started fighting with a man but he did not see who threw the first punch. Aguilar did not see anything in Camarena's hands when he got out of the SUV.

Dr. Joseph Cervantes, a clinical psychologist, testified he reviewed Camarena's intellectual functioning testing.<sup>2</sup> Cervantes stated Camarena's IQ was 73 or 74, which indicated borderline intellectual functioning. He explained someone with Camarena's level of functioning would suffer from the following: difficulty making decisions and understanding social judgment; limited abilities to see and comprehend options; lessened capacity to understand and appreciate events; and lessened ability to manage a situation and develop solutions that are less impactful and harmful to them. Cervantes also stated Camarena's testing showed low emotional intelligence and a poor memory. He opined Camarena had the emotional maturity of a 15 year old and he was operating at a fourth grade level in school.

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<sup>2</sup> Before Cervantes testified, defense counsel stated his testimony was relevant on two issues, deliberation/premeditation and the gang allegations.

At a hearing on the jury instructions, the trial court inquired whether counsel objected to the proposed instructions. When the court asked defense counsel whether the self-defense instructions were complete, he said they were. Later, defense counsel agreed the instructions on the two theories of attempted voluntary manslaughter, heat of passion and imperfect self-defense, were correct. Finally, when the court indicated evidence of Camarena's mental impairment was relevant only to the issues of premeditation and deliberation, defense counsel agreed.

The trial court instructed the jury on the charged offenses, the lesser included offenses, and the enhancements. As relevant here to count 1, the court instructed the jury on attempted murder, deliberation and premeditation, heat of passion, and imperfect self-defense. Additionally, the court instructed the jury it could consider evidence of Camarena's mental impairment for the limited purpose of determining whether he had the required specific intent or mental state, specifically whether he acted with premeditation and deliberation. Finally, the court instructed the jury on self-defense.

At the close of evidence, Camarena moved to dismiss count 2, aggravated mayhem, pursuant to section 1118. Relying on *People v. Park* (2003) 112 Cal.App.4th 61 (*Park*), and other cases from CALCRIM No. 800's use notes, defense counsel argued the evidence demonstrates the attack was indiscriminate and there was no evidence of a specific intent to disfigure. The trial court denied the motion concluding the evidence Dearing lowered his hands and Camarena slashed his neck was sufficient to support an aggravated mayhem conviction. The jury convicted Camarena of all the counts and found true all the allegations.

At the sentencing hearing, defense counsel acknowledged that pursuant to *People v. Campos* (2011) 196 Cal.App.4th 438 (*Campos*), the trial court was required to sentence Camarena to 15 years to life, instead of the customary seven-year minimum, pursuant to section 186.22, subdivision (b)(5), but counsel voiced his disagreement with

the law. The trial court stated: “Yeah. They say you can’t strike something that’s not an enhancement. And they don’t consider the 15 to life an enhancement.” Defense counsel added he disagreed with the *Campos* court’s conclusion a trial court does not have discretion to strike additional punishment pursuant to section 1385. Again, counsel acknowledged, “But that’s the state of the law.”

After giving his tentative sentence and allowing counsel the opportunity to argue, the trial court sentenced Camarena to prison for 15 years to life on count 1 pursuant to section 186.22, subdivision (b)(5). The court imposed and stayed the sentences on counts 2 and 3 pursuant to section 654. The court struck the great bodily injury and personal use enhancements pursuant to section 1385.

## DISCUSSION

### *I. Sufficiency of the Evidence*

Camarena argues insufficient evidence supports his conviction for aggravated mayhem. We disagree.

“Aggravated mayhem requires proof the defendant specifically intended to maim—to cause a permanent disability or disfigurement. [Citation] A jury may not find specific intent ‘solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately.’ [Citation.] ‘A jury may infer a defendant’s specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.’ [Citation.] ‘[E]vidence of a “controlled and directed” attack or an attack of “focused or limited scope” may provide substantial evidence of’ a specific intent to maim. [Citations.]” (*People v. Szadziejewicz* (2008) 161 Cal.App.4th 823, 831 (*Szadziejewicz*)). “We review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. [Citation.]” (*Ibid.*)

In *People v. Manibusan* (2013) 58 Cal.4th 40, 88 (*Manibusan*), the California Supreme Court addressed the issue of whether there was sufficient evidence of specific intent to support defendant's conviction for, *inter alia*, aggravated mayhem. In that case, defendant shot the victim multiple times from five to 10 feet away hitting her once in the face. The court stated that it had previously held shooting a victim in the head can support the inference of intent to kill and the court "now" holds shooting a victim in the head can support the "inference of an intent to cause permanent disability or disfigurement." (*Ibid.*) The court explained, "[A] defendant may intend both to kill his or her victim and to disable or disfigure that individual if the attempt to kill is unsuccessful,' and evidence that is sufficient to establish a defendant's intent to kill the victim can also be 'sufficient to establish the intent to permanently disable or disfigure that victim.' [Citations.]" (*Id.* at p. 89.)

In *Szadziewicz, supra*, 161 Cal.App.4th at pages 829, 831-832, a jury convicted defendant of aggravated mayhem after he entered the hotel room of his daughter's boyfriend, held him on the bed, and slashed his face with a box cutter from the temple towards the nose, then back towards the ear. The *Szadziewicz* court held the "placement and nature" of the "facial lacerations amply supported a reasonable inference that [defendant] meant to disfigure" the victim's face. (*Id.* at p. 832.)

Here, there was sufficient evidence demonstrating Camarena had the specific intent to permanently disable or disfigure Dearing during this unprovoked gang attack. The evidence established that as the SUV passed Dearing, Camarena made a gang hand sign. After the SUV's driver made a U-turn and cut off Dearing as he walked through the parking lot, Camarena got out of the SUV and "hit up" Dearing, asking him where he was from and announcing his own gang affiliation. After the two exchanged punches, Marzocca arrived at the scene and ordered the men to stop fighting. When Dearing lowered his hands and turned towards Marzocca, Camarena made a broad downward slashing motion with a seven inch knife across his neck. Like in *Manibusan*

where defendant shot victim in the head from close range, and *Szadziejewicz* where defendant slashed the victim's face with a box cutter, Camarena's slashing of Dearing's neck with a sizeable knife evidences both an intent to kill and an intent to permanently disable and disfigure.

Camarena relies on a number of cases where courts have found sufficient evidence of specific intent to disable or disfigure to argue the facts here are distinguishable and thus the evidence is insufficient to support his conviction on count 2.

In *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1163 (*Quintero*), the court held an intent to maim could reasonably be inferred from evidence defendant attacked a particularly vulnerable portion of the victim's body, his head, with forceful blows, stopping his attack only once he had maimed the victim's face. In *Park, supra*, 112 Cal.App.4th at pages 65, 69, when defendant became angry over a remark in a restaurant, he attacked his victim with a steel knife sharpener by aiming his blows to the head—a vulnerable part of the body—stopping only when he had knocked out several teeth. In *People v. Ferrell* (1990) 218 Cal.App.3d 828, 831-832, 835-835, defendant's acts were shown to have been “directed and controlled” because she asked for the victim by name, shot the victim's father in the knee as he moved to intervene, and then shot the victim in the neck at close range.

These cases are of no help to Camarena as they provide further support for our conclusion targeting the head or neck region with a deadly weapon can establish a specific intent to permanently disable or disfigure. Juxtaposed against these cases is *People v. Lee* (1990) 220 Cal.App.3d 320 (*Lee*), a case where the court found the evidence insufficient to support a conviction for aggravated mayhem.

In *Lee, supra*, 220 Cal.App.3d at page 326, defendant spontaneously attacked his neighbor with a barrage of punches to the head and kicks to the torso. Although defendant used no weapons, the victim sustained severe head trauma that caused permanent partial paralysis. The court of appeal reversed defendant's aggravated

mayhem conviction. The *Lee* court explained the requisite specific intent can be inferred from factors apart from the results of the attack, including the circumstances, manner, and means of the attack. (*Id.* at p. 325.) The court reasoned those factors did not exist because defendant did not shoot or stab the victim (he used his fists and feet), and although defendant punched victim in the face, he did not kick his head. The court concluded, “The evidence shows no more than a sudden, indiscriminate, and unfocused battering of [victim’s] body.” (*Id.* at p. 326.)

Unlike *Lee*, and similar to *Manibusan* and *Szadziewicz*, here Camarena focused his attack with a deadly weapon on one of the most vulnerable parts of a person’s body, the neck, demonstrating a controlled and directed attack or an attack of focused or limited scope. (*Szadziewicz, supra*, 161 Cal.App.4th at p. 831; *Quintero, supra*, 135 Cal.App.4th at p. 1162; *Lee, supra*, 220 Cal.App.3d at p. 326.) Therefore, sufficient evidence supports Camarena’s conviction for count 2.

## *II. Jury Instruction & Ineffective Assistance of Counsel*

Conceding he did not request amplification, Camarena contends the trial court erred by not instructing the jury it could consider evidence of his mental impairment vis-à-vis imperfect self-defense. Alternatively, Camarena claims his defense counsel was ineffective. As we explain below, Camarena was not prejudiced by any error.

The trial court is not required to give CALCRIM No. 3428 sua sponte but only on the defense’s request. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Larsen* (2012) 205 Cal.App.4th 810, 824.) A defendant who fails to request amplification of a jury instruction cannot later claim instructional error. (*People v. Maury* (2003) 30 Cal.4th 342, 426.)

Here, Camarena did not object or request amplification of the jury instruction on imperfect self-defense and thus he forfeited appellate review of this claim.

(*People v. Virgil* (2011) 51 Cal.4th 1210, 1260 [defendant who fails to object to instruction at trial forfeits appellate review of claim].)

With respect to Camarena's claim of ineffective assistance of counsel, it too is meritless. "If a claim of ineffective assistance of counsel can be determined on the ground of lack of prejudice, a court need not decide whether counsel's performance was deficient. [Citations.]" (*In re Crew* (2011) 52 Cal.4th 126, 150.) Here, Camarena was not prejudiced by any instructional error even under the heightened federal constitutional standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24.

In *People v. Wharton* (1991) 53 Cal.3d 522, 569 (*Wharton*), the trial court rejected defendant's proposed special instruction on provocation and heat of passion because a portion of it was an incorrect statement of law and other portions were covered in other instructions. The California Supreme Court stated: "Finally, although the jury was not directly instructed that provocation could occur over a 'considerable period of time,' the jury was instructed that a killing is first degree murder if it is 'the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not upon sudden heat of passion.' (See CALJIC No. 8.20.) By finding defendant was guilty of first degree murder, the jury necessarily found defendant premeditated and deliberated the killing. This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion—even if that state of mind was achieved after a considerable period of provocatory conduct—and clearly demonstrates that defendant was not prejudiced by the failure to give his requested instruction." (*Wharton, supra*, 53 Cal.3d at p. 572; *People v. Mincey* (1992) 2 Cal.4th 408, 438 [when jury found torture murder special circumstance true necessarily resolved against defendant factual questions on manslaughter].)

Camarena could not have been prejudiced by any instructional error because the jury necessarily resolved the factual question adversely to him when it found him guilty of attempted murder. After finding Camarena guilty of attempted murder, the

jury made the additional finding he acted willfully, deliberately, and with premeditation. This state of mind is manifestly inconsistent with having acted under the actual but unreasonable belief in the need to defend oneself. Thus, we conclude any instructional error was harmless beyond a reasonable doubt.<sup>3</sup>

### *III. Sentencing*

Camarena asserts the trial court was unaware of its discretion to strike the minimum term of 15 years as required by section 186.22, subdivision (b)(5), and we must remand for resentencing. In her supplemental letter brief, the Attorney General concedes the issue.

In *Fuentes, supra*, 1 Cal.5th at pages 221-222, 230, and footnote 8, the Supreme Court recently held section 186.22, subdivision (g), does not eliminate a trial court's discretion under section 1385 to dismiss a section 186.22, subdivision (b), sentencing enhancement allegation for a gang-related offense, disapproving of *Campos, supra*, 196 Cal.App.4th 438. Section 186.22, subdivision (g), provides, "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section . . . where the interests of justice would best be served . . . ." (*Fuentes, supra*, 1 Cal.5th at p. 224.) The *Fuentes* court opined a trial court's dismissal authority is broader under section 1385. (*Fuentes, supra*, 1 Cal.5th at pp. 224-225.) Whereas a trial court can dismiss a sentencing enhancement allegation under section 1385, a trial court's discretion under section 186.22, subdivision (g), is limited to striking the additional punishment for the enhancement. (*Fuentes, supra*, 1 Cal.5th at pp. 224-

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<sup>3</sup> After the trial here, the California Supreme Court issued its opinion in *People v. Elmore* (2014) 59 Cal.4th 121. In that case, the court further developed the concept of imperfect self-defense by explaining "defendants who mistakenly believed that actual circumstances required their defensive act may argue they are guilty only of voluntary manslaughter, even if their reaction was distorted by mental illness. But defendants who contend they killed in self-defense because of a purely delusional perception of threat must make that claim at a sanity trial." (*Id.* at p. 146.)

225.) The distinction is significant because an enhancement finding may impact a defendant in a future case even if the punishment for the enhancement is struck. (*Id.* at p. 225.) The court found nothing in the language of section 186.22 showing the clear legislative direction necessary to abrogate a trial court's discretion under section 1385. (*Fuentes, supra*, 1 Cal.5th at p. 231.)

Based on *Fuentes*, the Attorney General concedes the matter must be remanded for the limited purpose of providing the trial court the opportunity to exercise its discretion and strike the section 186.22, subdivision (b)(5), enhancement. We accept the Attorney General's concession.

#### DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court the opportunity to exercise its discretion and strike the section 186.22, subdivision (b)(5), enhancement and, if so, for resentencing. In all other respects, the judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.